No. 94-1300

Supreme Court, U.S.
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In The

# Supreme Court of the United States

October Term, 1994

CURTIS GUIDRY,

*Petitioner,*

v.

SHEET METAL WORKERS' NATIONAL PENSION FUND; SHEET METAL WORKERS' LOCAL UNIONS AND COUNCILS PENSION PLAN; SHEET METAL WORKERS' INTERNATIONAL ASSOCIATION, LOCAL 9; SHEET METAL WORKERS' LOCAL NO. 9 PENSION FUND, et al.,

*Respondents.*

**Petition For Writ Of Certiorari To The United States Court Of Appeals For The Tenth Circuit**

## BRIEF OF RESPONDENT PENSION FUNDS IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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Respondents Sheet Metal Workers' National Pension Fund, Sheet Metal Workers' Local Unions and Councils Pension Plan, and Sheet Metal Workers' Local No. 9 Pension Fund (hereinafter collectively "Pension Funds"), by their undersigned counsel and pursuant to U.S. Sup. Ct. Rule 15, submit the following brief in opposition to the Petition for Writ of Certiorari filed by Curtis Guidry. For the reasons set forth below, this brief addresses only the third of Guidry's four questions presented for review, namely:

> Should Guidry be awarded his reasonable attorneys' fees under ERISA, 29 U.S.C. § 1132(g), for fees arising after this Court's 1990 decision?

The Pension Funds accept Guidry's statement of the preliminary matters required by U.S. Sup. Ct. Rule 24(1)(a), (b), (d), (e), and (f).

## STATEMENT OF THE CASE

Prior to 1981, Guidry was the chief executive officer of Respondent Sheet Metal Workers' International Association, Local 9 (hereinafter the "Union"), and a trustee of Respondent Sheet Metal Workers' Local No. 9 Pension Fund.[1] In 1982, Guidry pleaded guilty to embezzling more than $377,000 from the Union. Before serving his prison term for embezzlement, Guidry claimed benefits

[1] For a complete background, *see Guidry v. Sheet Metal Workers' National Pension Fund*, 641 F. Supp. 360 (D. Colo. 1986), *aff'd*, 856 F.2d 1457 (10th Cir. 1988), *rev'd*, 493 U.S. 365 (1990), *appeal after remand*, 10 F.3d 700 (10th Cir. 1993), *on reh'g en banc*, 39 F.3d 1078 (10th Cir. 1994).

from the three Pension Funds. After the Pension Funds denied Guidry's claims for benefits on the grounds that he had forfeited the right to his pensions because of criminal misconduct against the Union, Guidry filed suit in the U.S. District Court for the District of Colorado pursuant to the Employee Retirement Income Security Act of 1974, 29 U.S.C. § 1001 *et seq.* ("ERISA").

The Union intervened in the litigation and filed claims against Guidry for recovery of the embezzled funds. In the course of the litigation, Guidry and the Union stipulated to the entry of a $275,000 judgment in the Union's favor and against Guidry. They agreed to litigate the availability of the constructive trust remedy requested by the Union.

The district court rejected the Pension Funds' claim that Guidry had forfeited his right to benefits; however, it concluded that ERISA did not preclude the imposition of a constructive trust over those funds in favor of the Union. 641 F. Supp. at 363. The district court judgment was affirmed by the U.S. Court of Appeals for the Tenth Circuit. 856 F.2d 1457 (10th Cir. 1988). This Court reversed, 493 U.S. 365 (1990), holding that ERISA's preclusion against the alienation of pension benefits precluded placing a constructive trust on Guidry's pension benefits. 493 U.S. at 375-76.

After this Court's decision, Guidry moved for reimbursement of his attorneys' fees expended in the litigation. The district court denied that request as to both the Union and the Pension Funds. It held that the litigation between Guidry and the Union did not arise under ERISA, so that the Union could not be subjected to

ERISA's provision regarding attorneys' fees. As to both the Union and the Pension Funds, the court ruled that Guidry was not entitled to an award of fees under the guidelines for recovery of fees in ERISA cases set forth in *Eaves v. Penn*, 587 F.2d 453 (10th Cir. 1978). Guidry did not appeal the district court's denial of fees.

In accordance with this Court's remand, on February 28, 1991, the district court entered judgment ordering the Pension Funds to pay past and future pension benefits to Guidry. At the same time, the Union made efforts to satisfy its $275,000 judgment against Guidry from those pension payments. The Union registered its judgment against Guidry in the U.S. District Court in Houston, Texas, where Guidry resided. When the Pension Funds tendered some $190,000 to Guidry at his home in Texas, in satisfaction of the award of back pension benefits, the funds were immediately seized by a U.S. Marshal and deposited into the registry of the Texas court. *See* Guidry Appendix, A-74. The Union also made efforts to collect its judgment through garnishments on a Denver bank account established by Guidry, into which the Pension Funds were to deposit his future monthly pension amounts as they became due.

These activities gave rise to post-judgment proceedings in the U.S. District Courts in Colorado and in the Southern District of Texas. On August 23, 1991, the parties stipulated that the money in the court registry in Texas would be transferred to the Denver bank account which was the subject of the Union's garnishment efforts, and that past and future pension payments would be deposited into that account and be subject to the Union's initial garnishment. Guidry Appendix, A-76 to A-80.

On January 8, 1992, the district court in Colorado entered its Findings, Conclusions and Order on Post-Judgment Issues (Guidry Appendix, A-66 to A-71). The court concluded that the ERISA exemption from garnishment, 29 U.S.C. § 1056(d)(1), applied to the payments made by the Pension Funds into the Guidry account, and noted that its conclusion was "mandated by the law of this case" as announced by this Court in its 1990 decision. Guidry Appendix, A-69. It further concluded that the Pension Funds' attempt to satisfy the judgment against them by the tender made in Texas was not legally effective; that the Pension Funds and the Union had not violated any order of the court and had not acted in contempt of court; and that neither the Texas exemption statute nor the Colorado exemption statute applied to the case.

The district court also denied Guidry's motion for recovery of his attorneys' fees and costs incurred subsequent to the district court's February 28, 1991, judgment in his favor. Guidry had argued that an award of fees was now appropriate even though the court had previously denied such an award, because the Union and the Pension Funds had shown "an obstinate and unbending attitude" toward this Court's decision and had conspired to continue to deprive him of his pensions. The district court rejected the argument, noting that the post-judgment dispute went beyond the initial action to recover plan benefits, and involved "both the plaintiff's claim of exemption under ERISA and the Union's efforts to collect on its judgment." Guidry Appendix, A-70. The court concluded that the attempted tender and seizure of funds in Texas was not forum shopping or misconduct by the

parties or by counsel, but instead constituted "diligent efforts" to avoid injustice. Although it had ruled those efforts invalid, the court declined to "add to the inequity by awarding attorney's fees." *Id.*

A three-member panel of the U.S. Court of Appeals for the Tenth Circuit, with one dissent, reversed the district court on the garnishment issue, concluding that the ERISA anti-alienation provision did not protect funds paid to and received by Guidry. 10 F.3d at 710. It also held that exemptions from garnishment provided by Colorado law were preempted by ERISA. *Id.* at 713. As to Guidry's cross-appeal of the district court's denial of his motion for attorneys' fees, the panel noted simply that "[b]ecause he is not the prevailing party, this issue is moot." *Id.* at 716.

Upon rehearing *en banc*, the Tenth Circuit agreed with the panel that ERISA's anti-alienation provision did not apply to protect Guidry's pension funds from garnishment once they were paid to and received by him. 39 F.3d at 1083. However, it reversed the panel on the issue of ERISA's preemption of state garnishment laws, and held that the funds were exempt from garnishment to the extent provided by Colorado law – i.e., 75 percent. *Id.* at 1083-84. The Tenth Circuit's decision on the attorneys' fees issue is set forth in a single footnote at the end of the majority opinion:

> In his original appeal, Mr. Guidry claimed that the district court abused its discretion in denying his request for attorneys fees. On rehearing, Mr. Guidry made specific arguments and also requested a rehearing on all other issues within

> the panel opinion, although he did not specifically reassert his earlier argument on the fee issue. Assuming that the issue is properly before the en banc court, we find no grounds for reversing the district court's ruling that Mr. Guidry was not entitled to a fee award under the ERISA fee-shifting provision, 29 U.S.C. § 1132(g). *See Downie v. Independent Drivers Ass'n Pension Plan*, 945 F.2d 1171, 1172 (10th Cir. 1991) (district court decision on a fee award under section 1132(g) reviewed for abuse of discretion).

*Id.* at 1087, n.11.

## SUMMARY OF ARGUMENT

Regardless of this Court's decision on the other issues raised in Guidry's Petition for Writ of Certiorari, the Court should deny certiorari on Guidry's third question presented for review (relating to the denial of his motion for attorneys' fees), the only issue which still involves the Pension Funds.

The attorneys' fees issue is entirely tangential to the main questions raised in this case, and was barely touched upon by the courts below. It is an issue of isolated significance, not of public importance. The issue does not involve any conflict among the circuits or unsettled question of law that needs to be resolved by this Court.

The law regarding attorneys' fee awards in ERISA cases is well settled, and was properly applied by the lower courts in this case. ERISA commits the decision on

attorneys' fees to the sound discretion of the district court. The cases have identified factors which are to guide courts in the exercise of this discretion. Application of those factors in this case supports the district court's denial of fees.

As the district court found, the parties against whom fees were sought in this case did not act in bad faith, and had a legitimate legal basis for their position. The unique circumstances of this case significantly lessen any potential deterrent effect from an attorneys' fees award, and likewise lessen the amount of "benefit," if any, to other plan participants from the decision in Guidry's favor. Moreover, it was not improper for the district court to take Guidry's criminal conduct into account in denying his motion for fees.

Because there are no "special and important reasons" for granting review of this issue, and because the district court's exercise of its discretion in denying fees was consistent with settled principles of law applicable to the issue, certiorari should be denied.

## ARGUMENT

Although the Union and Guidry have continued to litigate the legality of garnishment of pension funds subsequent to this Court's first opinion, the Pension Funds effectively withdrew from the litigation upon the parties' August 23, 1991, stipulation providing that all monies owed by the Pension Funds to Guidry would be paid into Guidry's Denver bank account. Guidry Appendix, A-76 to A-80. The Pension Funds' involvement in the case

since then has been limited to opposition to Guidry's request for attorneys' fees, which were sought both from the Pension Funds and from the Union. In this brief, the Pension Funds address only the attorneys' fees issue (question three in Guidry's Petition), and take no position on the other questions presented for review.

As to attorneys' fees, the Pension Funds believe that certiorari review of this issue should be denied regardless of this Court's determination of the other issues raised in Guidry's petition.

## I. THERE ARE NO UNSETTLED PRINCIPLES OF LAW, CONFLICTS AMONG THE CIRCUITS, OR OTHER "SPECIAL AND IMPORTANT REASONS" FOR GRANTING CERTIORARI REVIEW OF THE DENIAL OF GUIDRY'S MOTION FOR ATTORNEYS' FEES, AN ISSUE WHICH IS OF SIGNIFICANCE ONLY TO THE PARTIES AND WHICH IS WHOLLY TANGENTIAL TO THE MAIN ISSUES IN THIS CASE.

A petition for a writ of certiorari will be granted only when there are "special and important reasons therefor." U.S. Sup. Ct. Rule 10.1. Such reasons may include, for example, resolution of a conflict among the circuit courts of appeals or state courts of last resort concerning the meaning of a provision of federal law. *Braxton v. United States*, 500 U.S. 344, 347 (1991). This Court has stated in the past that certiorari review is not appropriate on issues which are of "isolated significance" and not of public importance. *Rice v. Sioux City Memorial Park Cemetery, Inc.*, 349 U.S. 70, 76-77 (1955).

Under these standards, certiorari should be denied on Guidry's attorneys' fees issue. This issue is wholly tangential to the main issues in this case, and was barely touched upon by the courts below. Whatever "nationwide significance" the other issues in Guidry's Petition may have, the attorneys' fee issue has no such significance. Neither Guidry nor any of the lower courts has identified any dispute over the tests or other legal principles applicable to a determination of this issue, or any conflict among the circuits that needs to be resolved by this Court. Moreover, including the attorneys' fees issue in any grant of certiorari in this case would involve parties (the Pension Funds) whose liability, except for attorneys' fees, has been long since resolved, and who are otherwise not directly affected by whatever decision is reached on the remaining issues.

## II. THE DISTRICT COURT'S DENIAL OF ATTORNEYS' FEES IN THIS CASE WAS A PROPER EXERCISE OF THE COURT'S DISCRETION, AND WAS CONSISTENT WITH SETTLED PRINCIPLES OF LAW APPLICABLE TO THIS ISSUE.

Certiorari should be denied because the attorneys' fees issue was properly resolved by the courts below. ERISA by its terms commits the decision whether to award attorneys' fees to the sound discretion of the district court. The district court's decision to deny fees in this case was a proper exercise of that discretion, and is consistent with conclusions reached by other courts applying well-established tests for deciding whether to award fees. The Tenth Circuit properly limited its review to determining whether there were grounds for finding

an abuse of discretion. There is no basis for further review of the issue by this Court.

### A. In Exercising their Discretion to Grant or Deny Attorneys' Fees in ERISA Cases, Courts are to Consider Factors Such as the Bad Faith of the Offending Parties, the Potential Deterrent Effect of a Fee Award, and the Merits of the Parties' Positions.

The award of attorneys' fees in this case is governed by ERISA § 502(g)(1) (29 U.S.C. § 1132(g)(1)), which provides in pertinent part:

> In any action under this subchapter . . . by a participant, beneficiary, or fiduciary, the court in its discretion may allow a reasonable attorney's fee and costs of action to either party.

Consistent with the language of the statute, the courts have recognized that an award of attorneys' fees in ERISA cases is committed to the sound discretion of the district court, and is reviewable on appeal only for abuse of discretion. *E.g., Custer v. Pan American Life Ins. Co.*, 12 F.3d 410, 422 (4th Cir. 1993); *Ramsey v. Colonial Life Ins. Co. of America*, 12 F.3d 472, 480 (5th Cir. 1994); *Tiemeyer v. Community Mut. Ins. Co.*, 8 F.3d 1094, 1102 (6th Cir. 1993), *cert. denied*, 114 S. Ct. 1371 (1994); *Consolidated Beef Industries, Inc. v. New York Life Ins. Co.*, 949 F.2d 960, 966 (8th Cir. 1991), *cert. denied*, 112 S. Ct. 1670 (1992); *Downie v. Independent Drivers Ass'n Pension Plan*, 945 F.2d 1171, 1172 (10th Cir. 1991); *Florence Nightingale Nursing Service, Inc. v. Blue Cross/Blue Shield of Alabama*, 41 F.3d 1476, 1485 (11th Cir. 1995).

Unlike the mandatory-fee shifting provisions of some statutes, a fee award is not required in ERISA cases even when one party prevails on the merits. *Quesinberry v. Life Ins. Co. of North America*, 987 F.2d 1017, 1030 (4th Cir. 1993); *Saltarelli v. Bob Baker Group Medical Trust*, 35 F.3d 382, 387 (9th Cir. 1994); *Freeman v. Continental Ins. Co.*, 996 F.2d 1116, 1119 (11th Cir. 1993).

In assessing whether to award fees, many courts have adopted the five-factor test first announced by the Tenth Circuit in *Eaves v. Penn*, 587 F.2d 453 (10th Cir. 1978). That test directs the courts to consider:

(1) The degree of the offending parties' culpability or bad faith;

(2) The degree of the ability of the offending parties to personally satisfy an award of attorneys' fees;

(3) Whether or not an award of attorneys fees against the offending parties would deter other persons acting under similar circumstances;

(4) The amount of benefit conferred on members of the pension plan as a whole; and

(5) The relative merits of the parties' position.

*Id.* at 465. *See also Quesinberry*, 987 F.2d at 1029; *Ramsey*, 12 F.3d at 480; *Armistead v. Vernitron Corp.*, 944 F.2d 1287, 1303 (6th Cir. 1991); *Saltarelli*, 35 F.3d at 388; *Florence Nightingale*, 41 F.3d at 1485. No one factor is decisive, and the courts may consider other factors in addition to the five enumerated here. *Plumbers and Steamfitters Local No. 150 Pension Fund v. Vertex Construction Co.*, 932 F.2d 1443, 1453 (11th Cir. 1991) (citing *Ironworkers Local No. 272 v.*

*Bowen*, 624 F.2d 1255, 1266 (5th Cir. 1980), for the proposition that "[n]o one of these factors is necessarily decisive, and some may not be apropos in a given case, but together they are the nuclei of concerns that a court should address. . . . In particular types of cases, or in any individual case, however, other considerations may be relevant as well"); *Quesinberry*, 987 F.2d at 1029; *Armistead*, 944 F.2d at 1304.

Attorneys' fees may be denied under this test even if one or more factors would support an award of fees. *See Ramsey*, 12 F.3d at 480 (no abuse of discretion in denying fees, even though defendant could afford to pay the attorneys' fee award); *Tiemeyer*, 8 F.3d at 1102 (same); *Davidson v. Canteen Corp.*, 957 F.2d 1404, 1409 (7th Cir. 1992) (denial of fees to plaintiffs not an abuse of discretion even though factors two and three of five-factor test weighed in plaintiffs' favor).

As to the first of the five *Eaves* factors, courts have been particularly willing to uphold denials of attorneys' fees where there has been no illegal or bad faith conduct on the part of the party against whom fees were sought. *See Custer*, 12 F.3d at 423; *Ramsey*, 12 F.3d at 480; *Harms v. Cavenham Forest Industries, Inc.*, 984 F.2d 686, 694 (5th Cir.), *cert. denied*, 114 S. Ct. 382 (1993); *Davidson*, 957 F.2d at 1410; *Freeman*, 996 F.2d at 1120. Similarly, denial of fees is appropriate where there was a legitimate legal basis for the position taken by the party against whom the fees were sought (*Eaves* factor five). *Custer*, 12 F.3d at 423; *Ramsey*, 12 F.3d at 480; *Harms*, 984 F.2d at 694; *Tiemeyer*, 8 F.3d at 1102; *Consolidated Beef Industries*, 949 F.2d at 966 (8th Cir. 1991) (CBE's claims were "serious and involved complicated legal issues that were sufficiently debatable

to justify plaintiff's pursuit of the claims"); *Freeman*, 996 F.2d at 1120.

In applying the other factors, courts have upheld denials of fees where the fee award would be unlikely to deter others (factor three), and where the successful party did not vindicate the rights of any other plan participants or benefit other persons (factor four). *See Custer*, 12 F.3d at 423; *Harms*, 984 F.2d at 694; *Davidson*, 957 F.2d at 1410; *Freeman*, 996 F.2d at 1120. Deterrent effect and benefit to others are often found to be lacking in cases involving unique circumstances. In *Ramsey*, for example, the appellate court upheld the district court's finding that the "uniqueness of the circumstances greatly diminished the deterrent effect of the ruling" and that "Ramsey's suit had no applicability to other ERISA participants." 12 F.3d at 480.

### B. The District Court's Denial of Attorneys' Fees to Guidry was Appropriate Under the Principles Outlined Above.

The district court's denial of attorneys' fees to Guidry in this case was a proper exercise of its discretion, and was entirely consistent with the general principles set forth above. The mere fact that this Court had previously ruled that the Pension Funds were required to pay Guidry's pension did not make the parties' subsequent attempts to satisfy the Union's judgment out of those funds into misconduct or bad faith – as the district court recognized. Guidry Appendix, A-70. Moreover, as the district court stated in its Memorandum Opinion and

Order denying Guidry's previous motion for fees,[2] an award of attorneys' fees to Guidry would not deter similar conduct by similar defendants in the future, given the uniqueness of the case and the small likelihood that the precise issue would arise in the future. *See Ramsey*, 12 F.3d at 480. Similarly, although Guidry's ultimate victory on the constructive trust issue might have conferred a theoretical benefit on other embezzlers or similarly situated plan participants, that limited benefit should not outweigh factors counseling strongly against an award of fees under the unusual facts of this case.

As to the "relative merits of the parties' positions," it should be remembered that the dispute between Guidry and the Pension Funds (as distinguished from the dispute between Guidry and the Union) was over the efficacy of

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[2] In its (unpublished) Memorandum Opinion and Order of December 31, 1990, the district court undertook a detailed analysis of the merits of Guidry's first attorneys' fee claim under the *Eaves* five-factor test. It found that the parties against whom fees were sought had not acted in bad faith, and that their arguments had been persuasive to the district court and to the court of appeals even though Guidry ultimately prevailed in this Court. It further found that the ability of the defendants to satisfy the judgment need not be addressed because the other factors supported a denial of a fee award; that awarding fees to Guidry would not deter similar conduct from similar defendants in the future under the unique circumstances of the case; that any benefits to other parties from Guidry's victory were insignificant under the unusual facts of the case; and that although Guidry ultimately prevailed on the merits, the defendants' position was reasonable and responsible. The court also stated that, while it was not to adopt a punitive attitude against Guidry, his criminal conduct was an appropriate factor to consider in determining whether to award fees.

the Pension Funds' tender of benefits in Texas. Although that tender was found later to have been ineffective, no court found it to have been illegal or otherwise so lacking in merit as to be punishable by an attorneys' fee award. Moreover, following that attempted tender, the Pension Funds complied with Guidry's request to transfer the moneys at issue to his Colorado bank account; and they did so pursuant to an August 1991 stipulation, long before the district court ruled on the issue.

Finally, as noted above, courts may properly consider other factors as well as the five enumerated *Eaves* factors in deciding whether to award fees. The district court appears to have taken into account Guidry's criminal conduct in deciding that the equities did not support an award of fees. Guidry Appendix, A-70. Contrary to Guidry's argument to this Court, it was not inappropriate for the district court to have done so. *See Plumbers and Steamfitters Local No. 150 Pension Fund*, 932 F.2d at 1453.

All these factors, taken together, amply support the district court's decision to deny fees to Guidry. Although the district court did not articulate all five of the *Eaves* factors in its second attorneys' fees ruling (as it had done in the first), that fact does not somehow require reversal of its determination. *See Florence Nightingale*, 41 F.3d at 1485 (upholding district court's denial of fees even though court focused only on one factor, the degree of the offending party's bad faith); *Plumbers and Steamfitters Local No. 150 Pension Fund*, 932 F.2d at 1453 (no abuse of discretion, even though district court considered only first and fifth factors of *Eaves* test); *Armistead*, 944 F.2d at 1304 (no remand necessary to require court to consider factors two through five of test, where such consideration

would not lead to a different result). The fact that the district court had gone through the five-factor *Eaves* analysis in detail when it denied Guidry's initial motion for fees (*see* n. 2, above) demonstrates that the court was familiar with the test. As in *Armistead*, nothing would be served by remanding this issue to the district court for a renewed articulation of the *Eaves* test, when such articulation would clearly not lead to a different result.

In his Petition, Guidry argues in regard to the attorneys' fee issue that "since the congressional purpose is that actual pension benefits be received, Guidry should be awarded his statutory reasonable attorney fees under ERISA . . . " (Petition, p. 13). This argument is illogical. It is undisputed that, in accordance with this Court's previous opinion, Guidry is receiving his pension benefits. It does not follow that anyone receiving pension benefits is also entitled to an award of attorneys' fees under ERISA. Congress could have included such a provision in ERISA, but it did not. Instead, the statute simply leaves the award of fees to the discretion of the court.

The district court's exercise of its discretion was appropriate under the unique circumstances of this case, and should not be disturbed by this Court.

## CONCLUSION

There are no "special and important reasons" for granting certiorari review of the denial of Guidry's request for attorneys' fees. The district court's ruling on fees was entirely consistent with well-established principles of law applicable to this issue. The Pension Funds

accordingly respectfully request that, regardless of this Court's resolution of the remaining issues, it deny Guidry's Petition to the extent that it seeks review of the district court's denial of his motion for attorneys' fees.

Respectfully submitted this 28th day of February, 1995.

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